Supreme Court, U. S.
FILED
DEC 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 75-369

WILLIAM BUCOLO, ET AL.,

Petitioners,

-vs-

JAMES ADKINS, CHIEF JUSTICE, ET AL.,

Respondents.

RESPONSE TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

ROBERT L. SHEVIN
Attorney General

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, FL 32304

Counsel for Respondents

TOPICAL INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS WHY THE MOTION SHOULD NOT BE GRANTED	4
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

	Page
Cardinale v. Louisiana, 394 U.S. 437 (1969)	4,7
Jenkins v. Georgia, 418 U.S. 157 (1974)	3
Kois v. Wisconsin, 408 U.S. 229 (1972)	3

OTHER AUTHORITY

	Page
Rule 3.191, F.R.Cr.P	2,3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-369

WILLIAM BUCOLO, et al.,

Petitioners,

-vs-

JAMES ADKINS, CHIEF JUSTICE, et al.,

Respondents.

RESPONSE TO MOTION FOR LEAFE TO FILE PETITION FOR WRIT OF MANDAMUS

Comes Now, Respondents in the above-styled cause pursuant to this Court's Order of October 30, 1975, and files this their response to the motion for leave to file petition for writ of mandamus filed by Petitioners.

OPINION BELOW

The opinion rendered by the Supreme Court of Florida referred to on page three of Petitioner's motion is accepted as being accurate.

JURISDICTION

For the reasons stated hereinabove, Respondents respectfully suggest Petitioners have failed to establish the requisite jurisdiction authorizing the relief prayed for.

QUESTION PRESENTED

Can Petitioners present to this Court by way of writ of mandamus a question not presented to the Florida Supreme Court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents respectfully submit that the constitutional provisions and the statutes cited by Petitioners are not involved in this cause; however, Rule 3.191(g), Florida Rules of Criminal Procedure is. Said rule provides:

> Effect of Mistrial; Order of New Trial. A person who is to be tried again shall be brought to trial within 90 days from the date of declaration of a mistrial by the trial court, the date of an order by the trial court granting a new trial, the date of an order by the trial court granting a motion in arrest of judgment, or the date of receipt by the trial court of a mandate, order, or notice of whatever form from an appellate or other reviewing court which makes possible a new trial for the defendant, whichever is last in time.

STATEMENT OF THE CASE

Respondents accept the Statement of the Case as stated in paragraphs one through four of Petitioners' brief found on pages five and six of the motion.

In addition, Respondents would assert that subsequent to rendition of the Supreme Court's Order on July 9, 1975, Petitioners made no attempt to have that Order modified although the rules of the Supreme Court authorize the filing of petitions for rehearing. In this regard there is no question but that this Court in reversing Petitioners' conviction on April 21, 1975, by referring to Jenkings v. Georgia, 418 U.S. 157 (1974) and Kois v. Wisconsin, 408 U.S. 229 (1972), conclusively determined that the materials disseminated by petitioners were not obscene as a matter of law. The undersigned acknowledges that in view of this ruling the Petitioners could not be reprosecuted. Respondents would submit, however, that it was incumbent upon Petitioners to bring this matter to the attention of the Florida Supreme Court so that a ruling could have been made.

In paragraph five, Petitioners state that the relief from further prosecution can only be obtained in this Court. Respondents would suggest that such is not the case. First, Petitioners could have filed a motion to quash the information in the trial court on the grounds that this Court authoritatively and conclusively determined the matter. Additionally, under Rule 3.191, Florida Rules of Criminal

Procedure, (Florida's Speedy Trial Rule) the state must initiate prosecution within 90 days from the date the mandate of the appellate court is received by the trial court. Of course, if prosecution is not commenced within that time, the defendant is discharged from the crime and prosecution is barred. The petition establishes that the Florida Supreme Court's mandate was handed down on July 24, 1975, and mathematical calculation shows the time for reprosecution has expired. As a consequence, there can be no trial of Petitioners by the State of Florida. Moreover, on November 4, 1975, pursuant to the instructions of the undersigned, the duly elected state attorney in and for Palm Beach County, Florida, nolle prossed the charges lodged against Petitioners. (Appendix I)

REASONS WHY THE MOTION SHOULD NOT BE GRANTED

As has heretofore been noted, following rendition of the Florida Supreme Court's decision on July 9, 1975, Petitioners did not attempt to raise the issue presented herein by way of filing a petition for rehearing. Moreover, they did not raise this issue in the trial court by moving to dismiss the information after the mandate had been issued. As a consequence, the issue now presented to this Court has never been presented to the Supreme Court of the State of Florida.

This Court in Cardinale v. Louisiana, 394 U.S. 437 (1969) clearly established that under such circumstances it was

without jurisdiction to entertain the merits of the federal claims first raised on appeal in this Court. The Court clearly and unequivocally held:

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L.Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet 368, 391, 9 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e. g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn.,

Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co v. Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v. California, 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v. Des Moines, 173 US 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v. City of Memphis, 20 Wall 590, 22 L Ed 429 (1875).

"In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 USC §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States

are not free to avoid constitutional issues on inadequate state grounds, O'Connor v Ohio, 385 US 92, 17 L Ed 2d 189, 87 S Ct 252 (1966), they should be given the first opportunity to consider them."

For the reasons stated above and on the authority of Cardinale v. Louisiana, this Court is without jurisdiction to consider the federal question tendered.

Moreover, in light of the failure of the State to comply with the speedy trial rule renders it impossible for Petitioners to be subjected to a second trial and action by this Court is therefore unnecessary to prevent the alleged injury anticipated by Petitioners.

CONCLUSION

For the reasons stated hereinabove, this Court should deny the petition for writ of mandamus.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, FL 32304

Counsel for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Motion for Leave to File Petition for Writ of Mandamus has been forwarded to

Richard Yale Feder and
Irma Robbins Feder
c/o A.C.L.U. of Florida
110 N. Hibiscus Drive
Miami Beach, FL 33139

Alfred I. Hopkins
c/o A.C.L.U. of Florida
1701 Meridian Avenue
Miami Beach, FL 33139

Allan B. Everard
c/oA.C.L.U. of Florida
1207 Harvey Building
West Palm Beach, FL 33401

via U. S. Mail, this day of November, 1975.

Raymond L. Marky
Assistant Attorney General

APPENDIX

IN THE COUNTY COUR , CRIMINAL DIVISION
IN AND FOR PALM BE CH CO UNTY, FLORIDA

Memor ndum

STATE OF FLORIDA

vs.

JAMES R. AGUT; ROMEO RIVARD; WILLIAM BUCOLO; RONALD A. SIMPSON; ARTHUR RICHARD AXELMAN; GORDON STEWART CHESSER & PAT A KELLY

CASE NO. 68M-3538 DIV. County

INFORMATION FOR

PUBLISHING OR CAUSING TO BE PUBLISHED AN OBSCENE AND INDECENT COMIC STRIP, PICTURES OR DRAWINGS CONTAINED IN A NEWSPAPER.....
(2 counts)

NO BILL

NOLLE PROSSE

ISSUE ALIAS CAPIAS

ISSUE PLURIES CAPIAS

PLACE ON ABSENTEE DOCKET

(Circle One)

The above entitled case: NOLLE PROSSE

REASON:

SUPREME COURT OF THE UNITED STATES REMANDED THIS CASE UNDER GUIDELINES OF MILLER V. CALIFORNIA. THIS CASE NOLLE PROSSED USING PROSECUTORIAL DISCRETION REGARDING ITS AGE AND LOCATION OF WITNESSES.

(Additional Information in State Attorney's work file)

This 4th day of November , 19 75

RECEIVED
NOV 6 1975
ATTORNEY GENERALS OFFICE

DAVID H. BLUDWORTH
State Attorney
Palm Beach County, Florida

By [redacted]